PD-1247-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 4/15/2019 3:04 PM
Accepted 4/16/2019 9:25 AM
DEANA WILLIAMSON
CLERK

Cause Number PD-1247-18

FILED
COURT OF CRIMINAL APPEALS
4/16/2019
DEANA WILLIAMSON, CLERK

IN THE COURT OF CRIMINAL APPEALS

SIDNEY ALEX WORK

Appellant,

v.

STATE OF TEXAS

Appellee.

ON APPEAL FROM THE 35TH JUDICIAL DISTRICT COURT
MILLS COUNTY, TEXAS – CAUSE NUMBER 3106
AND THE COURT OF APPEALS
FOR THE THIRD DISTRICT – CAUSE NUMBER 03-18-00244-CR

BRIEF ON THE MERITS FOR THE STATE OF TEXAS

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IDENTITY OF PARTIES AND COUNSEL

Pursuant to Rule 74(a) of the Texas Rules of Appellate Procedure the State lists the names and addresses of all parties to the Trial Courts final judgment and their trial counsel in the trial court.

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

STATUTES

RULES

CASES

OTHER SOURCES

STATEMENT OF THE CASE

Appellant was indicted for Possession of a Controlled Substance in a Drug Free Zone and Tampering with or Fabricating Physical Evidence – with a repeat offender allegation.[1] Appellant filed several motions objecting to audio portions of a recording of the traffic stop.[2] After a pre-trial hearing, viewing the video, and discussions during the trial, the judge admitted some portions of the video and excluded other portions.[3]

A jury then found Appellant guilty of both offenses, and the trial judge assessed sentences of six years' imprisonment on the tampering case and two years' imprisonment on the drug case.[4]

The Third Court of Appeals considered whether the trial judge erred by admitting evidence of extraneous offenses contained on the video, and ultimately affirmed the judgment of conviction.[5]

STATEMENT OF FACTS

During a traffic stop for speeding, Appellant – the driver of a truck – gave law enforcement consent to search his truck.[6] Appellant initially said that nothing

[1] C.R. p. 10.
[2] C.R. pp. 26-28, 30-33, 34-37, 39-41.
[3] C.R. pp. 30, 37, 44; *See* R.R. Vol. 5; R.R. Vol. 7, pp. 68-97, 166, 157-70; R.R. Vol. 8, pp. 6-12, 36-37.
[4] C.R. pp. 61-63, 70.
[5] *Work v. State*, No. 03-18-00244-CR, 2018 WL 2347013, at *1 (Tex. App.—Austin May 24, 2018, pet. granted)) (Mem. op., not designated for publication).
[6] R.R. Vol. 7, pp. 33-34, 39, 46-47.

illegal was in the vehicle.[7] However, as deputies were in the middle of searching, Appellant admitted that a broken marijuana pipe would be in the cup holder of the console.[8] After finding the marijuana pipe, the officer also noticed a cup of coffee on the passenger side leaning against the console.[9] Inside the cup was a bag of marijuana floating on top of the coffee.[10] Underneath the marijuana, a bag of methamphetamine was found in the liquid.[11]

Both Appellant and the passenger of the truck, Marla Morgan, denied that the drugs belonged to them.[12] However, on-scene Morgan eventually claimed that she had placed the drugs in the cup when the deputy began pulling the truck over.[13]

At trial, Appellant claimed that he did not know about the methamphetamine, that the coffee cup belonged to Morgan, was found in her seat, and that she put the methamphetamine in the cup.[14]

SUMMARY OF THE ARGUMENT

Appellant cannot show that the court of appeals erred in its analysis. The court of appeals based its decision to uphold the trial court's ruling on the reasonableness of the trial court's conclusions given the specific facts involved in

[7] R.R. Vol. 7, pp. 47-48.
[8] R.R. Vol. 7, pp. 48-50.
[9] R.R. Vol. 7, pp. 51-53, 109.
[10] R.R. Vol. 7, pp. 52-53.
[11] R.R. Vol. 7, pp. 53-54.
[12] R.R. Vol. 7, p. 54.
[13] R.R. Vol. 7, pp. 102-03, 107.
[14] R.R. Vol. 7, pp. 16, 133.

this case. Appellant's use of methamphetamine by injecting a few months prior to the traffic stop and his previous involvement with narcotics were relevant to address several different issues hotly contested by Appellant at trial – intent, knowledge, identity, and the defensive theory that the drugs were possessed by the passenger in the car. After determining that this evidence was relevant, the court of appeals then carefully considered all of the factors under Rule 403 and reasonably concluded that the admission of the extraneous evidence was not error.

ARGUMENT

Evidence of extraneous drug offenses may be relevant – under specific facts and circumstances – to show a defendant's intent, knowledge, rebut defensive theories, and identity when those issues are raised during trial. Appellant's trial counsel blamed the entire offense on Appellant's passenger in the truck and put all of those issues at play in this case. Given the brief amount of extraneous evidence involved, the nature in which that evidence was admitted, prior case law in Texas, and the arguments of the parties, the trial judge was not outside the zone of reasonable disagreement in admitting the evidence.

STANDARD OF REVIEW FOR ALL GROUNDS FOR REVIEW

Trial courts are in the best position to make the call on the substantive admissibility questions related to extraneous offenses.[15] Therefore, an appellate court reviews a trial court's decision to admit or exclude extraneous offenses, as well as its decision as to whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, under an abuse of discretion standard.[16] A trial court abuses its discretion when its decision lies outside the zone of reasonable disagreement.[17] A reviewing court may not substitute its own decision for that of a trial court.[18]

RELEVANCE OF EXTRANEOUS OFFENSES GENERALLY

The court of appeals analysis of the relevance of the extraneous offenses was correct and should be upheld.

Relevant evidence is evidence which has any tendency to make the existence of any fact of consequence more or less probable than it would be without the evidence and the fact is of consequence in determining the action.[19]

Although not admissible to show character conformity, Texas Rule of Evidence 404 states that evidence of a defendant's "other crimes, wrongs, or acts" may be admissible if the extraneous offense has relevance apart from its tendency

[15] *Powell v. State*, 63 S.W.3d 435, 438 (Tex. Crim. App. 2001).
[16] *See Gonzalez v. State*, 544 S.W.3d 363, 370 (Tex. Crim. App. 2018).
[17] *Id.*
[18] *Id.*
[19] Tex. R. Evid. 401 (West 2019).

to prove character conformity.[20] It is important to note that the possibility of an extraneous offense having a tendency to show character conformity does not negate its admissibility if it *also* has relevance *apart from* the character conformity.[21]

Rule 404(b) provides "no mechanical solution" to excluding or admitting evidence of other wrongs committed by a defendant, [22] and relevance does not require each particular fact by itself to prove or disprove a particular fact.[23] Instead, small nudges toward proving or disproving facts of consequence are sufficient.[24]

The Mens Rea Requirement in Appellant's Cases

Because both of the offenses that Appellant was convicted of require either intentional or knowing action,[25] the extraneous offenses were relevant to assist

[20] Tex. R. Evid. 404(b) (West 2019); *Gonzalez*, 544 S.W.3d at 370-71.
[21] *Powell*, 63 S.W.3d at 439 (emphasis in original).
[22] *Montogmery v. State*, 810 S.W.2d 372, 377 (Tex Crim. App. 1990) (en banc) (quoting the Advisory Committee's Note to the Federal Rules of Evidence).
[23] *Gonzalez*, 544 S.W.3d at 370.
[24] *Id.*
[25] Tex. Health & Safety Code §481.115(a) (West 2017); Tex. Pen. Code §37.09(a)(1) (West 2017). A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result. Tex. Pen. Code §6.03(a) (West 2017). A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result. Tex. Pen. Code §6.03(b) (West 2017).

jurors in determining the probability that Appellant's actions were intentional and knowing.[26]

Possession of a Controlled Substance

A person commits an offense if the person knowingly or intentionally possesses a controlled substance in an amount that is less than a gram.[27] A defendant's connection to the drug must be more than just the fortuitous result of his mere presence in the location where the drugs were found.[28]

Affirmative links of the connection between a defendant and a controlled substance – proven either through direct or circumstantial evidence – are particularly important when the contraband is not in the exclusive possession of the defendant.[29] This court has created a non-exclusive list of factors that may indicate a link connecting a defendant to the knowing possession of contraband.[30] This list includes:

(1) The defendant's presence when a search is conducted;
(2) Whether the contraband was in plain view;
(3) The defendant's proximity to and the accessibility of the narcotic;
(4) Whether the defendant was under the influence of narcotics when arrested;

[26] *See Montogmery*, 810 S.W.2d at 376 (holding that if a trial court believes that a reasonable juror would conclude that the proffered evidence alters the probabilities involved to any degree, relevancy is present).
[27] Tex. Health & Safety Code §481.115 (a)-(b) (West 2017).
[28] *See Tate v. State*, 500 S.W.3d 410, 413 (Tex. Crim. App. 2016); *Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995) (en banc).
[29] *See Tate*, 500 S.W.3d at 413-14; *Brown*, 911 S.W.2d at 747.
[30] *Tate*, 500 S.W.3d at 414.

(5) Whether the defendant possessed other contraband or narcotics when arrested;
(6) Whether the defendant made incriminating statements when arrested;
(7) Whether the defendant attempted to flee;
(8) Whether the defendant made furtive gestures;
(9) Whether there was an odor of contraband;
(10) Whether other contraband or drug paraphernalia were present;
(11) Whether the defendant owned or had the right to possess the place where the drugs were found;
(12) Whether the place where the drugs were found was enclosed;
(13) Whether the defendant was found with a large amount of cash; and
(14) Whether the conduct of the defendant indicated a consciousness of guilt.[31]

Based upon these requirements, the State not only had to convince twelve jurors that Appellant's presence in a truck that contained methamphetamine was not simply a fortuitous accident, but also had to convince judges reviewing the case on appeal for sufficiency of the evidence that there were sufficient affirmative links to justify the jury's decision.[32]

Tampering with Evidence

A person commits an offense if, knowing that an investigation or official proceeding is pending or in progress, he alters, destroys, or conceals any record, document or thing with intent to impair its verity, legibility, or availability as

[31] *Id.*
[32] Appellant raised a sufficiency of the evidence claim in the lower court alleging that the evidence was not sufficient to support his conviction because "there was 'insufficient evidence in this case that directly links [him] to' the methamphetamine." *Work v. State*, No. 03-18-00244-CR, 2018 WL 2347013, at *1 (Tex. App.—Austin May 24, 2018, pet. granted)) (Mem. op., not designated for publication).

evidence in the investigation or official proceeding.[33] As with the possession case, the State had to prove that Appellant concealed the methamphetamine while intending to impair its availability.

THE RELEVANCE OF EXTRANEOUS OFFENSES IN DRUG CASES

Since Appellant was not in exclusive possession of the drugs and put his intent and knowledge into issue through opening statements and cross-examination of witnesses, the court of appeals did not err in holding that evidence of a connection between Appellant and controlled substances was relevant to show that he was not just unluckily stopped while in the presence of someone else who possessed a controlled substance.

Defendants have a Fifth Amendment privilege not to testify at either the guilt or punishment phases of a trial.[34] Therefore, circumstantial evidence of intent and knowledge becomes critically important in trials where *mens rea* is at issue. Because of this, courts have consistently recognized that proof of a culpable mental state generally relies on circumstantial evidence.[35]

Given the importance of circumstantial evidence in these types of situations, the rules of evidence allow for evidence of a crime, wrong, or other act to be

[33] Tex. Pen. Code §37.09 (a)(1) (West 2017).
[34] *In re Medina*, 475 S.W.3d 291, 298 (Tex. Crim. App. 2015).
[35] *See, e.g., Dillon v. State*, 574 S.W.2d 92, 94 (Tex. Crim. App. 1978).

admissible to show intent or knowledge.[36] This is true when the required intent cannot be inferred from the act itself, or if the accused presents evidence to rebut that inference.[37]

Case Law Addressing Extraneous Drug Cases

A significant amount of case law supports the conclusion that extraneous drug offenses may be relevant and admissible to show intent in a charged drug offense. First, many courts have specifically reached this conclusion.[38] Although this relevance is often posited without much explanation for the specific logical steps involved in drawing this conclusion, several possible reasons exist for this lack of explicit detail.

First, in several cases it appears that the connection is so obvious that further explanation is deemed unnecessary, or, given the particular analysis, not a necessary part of the court's decision.

Second, the logic involved may be experience based, as opposed to a formal syllogism, and may be difficult to reduce to a written decision.

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[36] *See* Tex. R. Evid. 404(b)(2) (West 2019).

[37] *Brown v. State*, 96 S.W.3d 508, 512 (Tex. App.—Austin 2002, no pet.).

[38] *See, e.g., Arnott v. State*, 498 S.W.2d 166, 176 (Tex. Crim. App. 1973) (Opinion on Rehearing); *Hung Phuoc Le v. State*, 479 S.W.3d 462, 470-71 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *Melton v. State*, 456 S.W.3d 309, 315 (Tex. App.—Amarillo 2015, no pet.); *Wingfield v. State*, 197 S.W.3d 922, 925-26 (Tex. App.—Dallas 2006, no pet.); *Mason v. State*, 99 S.W.3d 652, 656 (Tex. App.—Eastland 2003, pet. ref'd); *Payton v. State*, 830 S.W.2d 722, 730 (Tex. App.—Houston [14th Dist] 1992, no pet.); *Patterson v. State*, 723 S.W.2d 308, 313 (Tex. App.—Austin 1987) *aff'd* 796 S.W.2d 938 (1989) (pointing out that the "element of knowledge cannot otherwise be readily inferred" in cases where the State's case depends entirely on circumstantial evidence); *Turner v. State*, No. 01-98-00862-CR, 1999 WL 312333 at *2 (Tex. App.—Houston [1st Dist.] May 13, 1999, pet. ref'd) (not designated for publication) (holding that "testimony of Appellant's prior, knowing transportation of cocaine was *highly probative of his knowledge and intent* in this case." emphasis added)' *Cal. v. MacArthur*, 271 P.2d 914, 917-18 (Cal. Dist. Ct. App. 1954).

Determining the relevance of any given item of evidence to any given lawsuit is not exclusively a function of rule and logic.[39] The trial court must rely in large part upon its own observations and experiences of the world, as exemplary of common observation and experience.[40] The trial court must then reason from its experiences in deciding whether the proffered evidence has "any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence."[41] Thus, the determination of relevance depends on one judge's perception of common experience and cannot be wholly objectified.[42]

Thus, another possible explanation may be that the judges involved in these decisions – on both the trial and appellate court level – believe that a person who has previous experience with narcotics is likely to be aware of narcotics within their possession based upon the judges own observations and experiences.

For example, a person using methamphetamine over a period of time may develop a distinctive physical appearance based upon side effects of the drug.[43] A trial judge may find it less likely that, given the nature of addiction, someone who

[39] *Beham v. State*, 559 S.W.3d 474, 478 (Tex. Crim. App. 2018).
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *See* R.R. Vol. 7, pp. 24-26, 41-42, 105, 111-12; National Institute on Drug Abuse, "What are the long-term effects of methamphetamine abuse?", (last updated Sep. 2013), https://www.drugabuse.gov/publications/research-reports/methamphetamine/what-are-long-term-effects-methamphetamine-abuse (noting that physical effects may include weight loss, severe tooth decay, "meth mouth" (tooth loss), and skin sores).

previously used methamphetamine accidentally associated with someone else who was actively involved in the use of methamphetamine.

Third, relevance may also be derived from an extraneous offense's ability to counteract a perceived societal aversion to certain notions.[44] Like the Dr. John song "Right Place Wrong Time," many members of society believe "I been in the right place but it must have been the wrong time…I been in the right trip but I must have used the wrong car…" The societal belief that some people, particularly people riding in cars with drug users, get convicted of drug offenses only because of guilt by association is widespread. Judges could reasonably believe that the extraneous offenses are relevant to rebut that notion when a defendant puts their intent into issue in a case.

Fourth, the logical connection may relate to the effects of addiction. Supreme Court Justice Douglas's concurrence in *Robinson v. California* discussed the effects of addiction. Douglas states that:

> [T]here is 'a hard core' of 'chronic and incurable drug addicts who, in reality, have lost their power of self-control.'…'The hold of drugs on persons addicted to them is so great that it would be almost appropriate to reverse the old adage and say that opium derivatives represent the religion of the people who use them.' The abstinence symptoms and their treatment are well known. Cure is difficult because of the complex of forces that make for addiction.[45]

[44] *See Montgomery v. State*, 810 S.W.2d 372, 394 (Tex. Crim. App. 1990) (en banc).
[45] *Robinson v. Cal.*, 370 U.S. 660, 673 (1962) (Douglas, J., concurring) (internal citations omitted).

Although current parlance may hesitate to use the exact language of Justice Douglas, it can hardly be said that the effects of addiction have lessened over the last fifty years. Given the struggle inherent in solving addition – particularly to drugs such as cocaine and methamphetamine – judges could logically believe that previous use makes it more probable that a person is currently using and/or possessing methamphetamine based upon the effects of addiction.[46]

Reasonable persons may disagree whether in common experience any or all of these particular inferences are available.[47] However, where there is room for such disagreement, an appellate court that reverses a trial court's ruling on relevancy accomplishes nothing more than to substitute its own reasonable perception of common experience for that of the trial court.[48] Therefore, if any of these positions could be held by a reasonable person, this Court should not substitute its opinion for the trial courts simply because it disagrees with these inferences.

Case Law Addressing the Relevance of Extraneous Offenses

Additionally, this Court has consistently found that extraneous offenses may be relevant to the non-character conformity purposes of showing a defendant's

[46] This is a situation that is unique to drug offenses and would not apply to other types of extraneous offenses.
[47] *See Montgomery v. State*, 810 S.W.2d at 391. The State would point out that it should not matter whether the judges of this court all agree that all of these logical reasons apply or which logical reasons apply. In order to respect the non-mechanical nature of this analysis and its reliance on a deferential standard of review, if reasonable persons could disagree about whether any of these inferences are available – this Court should not categorically refuse to recognize them.
[48] *Id.*

mens rea in a variety of circumstances and types of cases.[49] Although these are not drug cases, the same type of logical inference used in these cases could be used to show the relevance of an extraneous drug offense in a drug case.

Inferences from Drug Case Law

Furthermore, even though not directly dealing with this issue, inferences available from case law related to drug cases also support this conclusion.

Several of the factors set out in *Tate* for the affirmative links doctrine recognize that possession of a controlled substance does not exist in a vacuum. Evidence that a defendant was: (1) under the influence of narcotics when arrested, (2) possessed other contraband, narcotics, or paraphernalia, (3) attempted to flee, (4) made furtive gestures consistent with tampering with evidence, or (5) found with a large amount of cash, all provide circumstantial evidence that the defendant was engaged in a crime or wrong other than the charged offense. However, these extraneous offenses[50] have all been regularly found to provide not only circumstantial evidence of knowledge, but necessary circumstantial evidence when

[49] *See., e.g., Casey v. State*, 215 S.W.3d 870, 880-84 (Tex. Crim. App. 2007) (holding that "photographs of the extraneous sexual assault on an apparently unconscious woman in the [defendant's] residence are illustrative of a motive to engage in nonconsensual sexual activity for the purpose of photographing the activity."); *Robbins v. State*, 88 S.W.3d 256, 259-62 (Tex. Crim. App. 2002) (holding that it was "subject to reasonable debate in this case whether the relationship evidence [of prior injuries the defendant inflicted on the seventeen-month old victim] tended to show [the defendant's] intent to hurt the victim."); *Plante v. State*, 692 S.W.2d 487, 492-93 (Tex. Crim. App. 1985) (en banc) (holding that "numerous instances of failing, after promising to pay for the sale, lease, or loan of goods or services of value make it more probable that [the defendant] never intended to pay" for goods obtained on credit from a company called Dal-Tile).

[50] Although possession of large amounts of cash is not a criminal offense in itself – the relevance of this factor derives from the fact that it provides circumstantial evidence that a defendant previously possessed and delivered narcotics to other individuals. Without that element of criminal wrongdoing, possession of large amounts of cash would have no value as an affirmative link.

more than one person is in possession of the controlled substance. Although the claim can certainly be made that at least most of these factors involve extraneous conduct committed at the same time as the charged offense as opposed to offenses committed in the past, this distinction would affect the analysis under Rule 403 – not the logical syllogism from which knowledge is inferred.

Furthermore, before *Tate* was decided, numerous cases included as one of the affirmative link factors whether an "accused has a special connection to the contraband."[51] The inclusion within that list of evidence that a defendant has a "special connection" to narcotics implies that numerous judges believed that extraneous offenses would be relevant to determining intentional and knowing possession.

Case Law Taking a Different Position

Appellant cites to cases which held that extraneous offenses were not relevant outside of character conformity purposes and asks this Court to agree with them.[52] However, the State believes, based upon the arguments presented above, that extraneous offenses can be relevant to show more than simply that a defendant is aware of what a particular controlled substance looks like. Therefore, if there

[51] *See, e.g., Roberson v. State,* 80 S.W.3d 730, 735 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd); *Jenkins v. State,* 76 S.W.3d 709, 713 (Tex. App.—Corpus Christi 2002, pet. ref'd); *Corpus v. State,* 30 S.W.3d 35, 38 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd); *Fields v. State,* 932 S.W.2d 97, 104 (Tex. App.—Tyler 1996, pet. ref'd); *Hurtado v. State,* 881 S.W.2d 738, 743 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd); *Gilbert v. State,* 874 S.W.2d 290, 298 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd); *Whitworth v. State,* 808 S.W.2d 566, 569 (Tex. App.—Austin 1991, pet. ref'd).

[52] *See Appellant's Brief on the Merits*, p. 20.

can be relevance apart from character conformity, this Court should not as a matter of policy declare that extraneous offenses cannot, ever be found relevant. Instead, it should rely on the well-settled procedures set in place under Rules of Evidence 403 and 404(b) to allow trial judges to continue making a case by case determination given all of the facts, circumstances, and defensive claims at play in each trial.

GROUND FOR REVIEW ONE AND TWO: THE EXTRANEOUS OFFENSES WERE RELEVANT TO SHOW APPELLANT'S INTENT AND KNOWLEDGE

As Appellant put his mental state at issue and blamed the passenger, the extraneous offenses were relevant to show that he was involved in the possession and tampering and not merely an innocent bystander.

Appellant Put His Mens Rea at Issue

During his opening statement, Appellant's attorney claimed that:

- Appellant did not know about the methamphetamine;
- The coffee cup belonged to Morgan;
- The cup was found in Morgan's seat;
- Morgan put the methamphetamine in the cup.[53]

Appellant's attorney also stated "….possession requires knowledge or intent. That's what I want you to be looking for, is that knowledge or intent…"[54]

[53] R.R. Vol. 7, pp. 16. Depending on how the defense opening statement is read, Appellant's attorney may also have stated that Morgan said the methamphetamine belonged to her. (lines 11-12 – "…it should show that she is the one who stated that it was hers…"). It is unclear whether the "it" in counsel's sentence referred to the methamphetamine or the coffee cup.
[54] R.R. Vol. 7, p. 16.

Appellant's attorney also cross-examined law enforcement to draw out the following information:

- The drug paraphernalia was not warm to the touch or smoldering;
- The coffee cup was in the passenger seat;
- There was no loose marijuana or marijuana pipes in the coffee cup;
- The lack of needles found in the truck;
- Neither the coffee cup nor the marijuana was tested for fingerprints;
- The bag of methamphetamine was also not tested for fingerprints;
- The marijuana found in the pipe was not tested to see if it was the same type of marijuana that was found in the coffee cup;
- Morgan was arrested on-scene for tampering with evidence; and
- Appellant was not arrested on-scene for tampering with evidence.[55]

The court of appeals' decision implicitly recognizes that Appellant put his intent and knowledge at issue.[56] This determination should be upheld by this Court as the trial judge did not abuse his discretion in making this determination given the opening statement and cross-examination by Appellant's trial counsel.

Relevance Applied to Knowledge and Intent

Appellant's statements on-scene that he had intravenously used methamphetamine two and a half or three months prior to the stop and had a previous arrest and conviction for a felony drug offense, at a minimum, provided small nudges toward proving that Appellant's presence around methamphetamine

[55] R.R. Vol. 7, pp. 132-37.

[56] *Work v. State*, No. 03-18-00244-CR, 2018 WL 2347013, at *10 (Tex. App.—Austin May 24, 2018, pet. granted)) (Mem. op., not designated for publication). Vigorous cross-examination of prosecution witnesses may be sufficient to put a defendant's intent at issue. *Robbins v. State*, 99 S.W.3d 265, 261 (Tex. Crim. App. 2002). Furthermore, opening statements may also open the door to the admission of extraneous-offense evidence. *Bass v. State*, 270 S.W.3d 557, 563 (Tex. Crim. App. 2008).

was not a fortuitous accident.[57] The court of appeals used the correct standard for evaluating relevance - would a reasonable person, with some experience in the real world believe that these statements were helpful in determining the truth or falsity of Appellant's claim that he was unaware of the methamphetamine.

The flaw within Appellant's reasoning is that he examines the relevance of the extraneous offenses in a vacuum – requiring the extraneous offenses to prove or disprove intent and knowledge *by itself and without reference to all of the evidence before the trial judge at the time of the ruling.* Such a standard is an incorrect evaluation of relevance.

A. Similarity to the Charged Offense

Appellant complains that the extraneous offense did not have sufficient similarity to the charged offense to be admissible.[58] However, such a high degree of similarity to constitute proof of modus operandi is not required when the purpose of the proof is to show intent.[59]

Furthermore, even assuming that a different type of controlled substance was involved, the similarity of the two offenses can easily been seen in Appellant's

[57] The court of appeals determination that nothing about the "exchange about whether [Appellant] had been given the *Miranda* warnings before" "indicated that [Appellant] had been arrested for any offense other than the drug offense that [Appellant] previously admitted to and that the district court determined was admissible under Rule 404(b)" was a reasonable determination. *See Work*, 2018 WL 2347013 at *11. Therefore, the "*Miranda* warnings exchange" should not change the analysis – the court's analysis appears to be a mini-harm argument sandwiched within the relevance discussion.

[58] *See Appellant's Brief on the Merits*, p. 22.

[59] *Plante v. State*, 692 S.W. 2d 487, 493 (Tex. Crim. App. 1985) (en banc).

claims about who possessed the controlled substances and in the nature of both drugs as stimulants or "uppers." In the prior drug case, Appellant claimed that he had some drugs that "belonged to a friend."[60] In this case, his claim at trial was that the drugs belonged to his passenger. The fact that he blames persons he is associating with in each case provides sufficient similarity to show his intent and knowledge.[61] Therefore, the court of appeals' determination that the offenses were sufficiently similar was not error.[62]

B. Different Types of Knowledge

Appellant also claims in his brief that knowledge of the nature of a controlled substance is different from knowledge of the presence of a controlled substance.[63] However, this particular claim was not made at the trial court level.[64] Rather, Appellant's trial counsel used the word "knowledge" in a manner during his opening statement that was ambiguous. He stated:

> So, I, too, want you to look to the details and the evidence, because the evidence has to prove to you those facts beyond a reasonable doubt. And *possession requires knowledge or intent*. That's what I

[60] R.R. Vol. 7, pp. 163-64.
[61] See the section below on the Doctrine of Chances.
[62] *See Work*, 2018 WL 2347013 at *10.
[63] *See Appellant's Brief on the Merits*, p. 17.
[64] *See generally* R.R. Vol. 5. *See* R.R. Vol. 6, pp. 4-7; C.R. pp. 26-28, 30-41. A complaint on appeal must comport with the complaint made at trial. *See Pena v. State*, 285 S.W.3d 459, 464 (Tex. Crim. App. 2009). The court of appeals also recognized that some error preservation issues existed in this case because some of the statements made by Appellant on the video were also admitted into evidence without objection through the direct testimony of one of the law enforcement officers. *See Work*, 2018 WL 2347013 at *10. A trial judge should not be faulted for not making a distinction that the parties are also not making – especially given the procedural context of this particular case. Appellant had numerous opportunities to present this distinction at trial, yet never did.

> want you to be looking for, is that *knowledge or intent*. Thank you for your time.[65]

Given defense counsel's ambiguous language during a fairly brief opening statement, neither the State nor the trial judge counsel ensure which type of knowledge defense counsel was referencing.

Taking into consideration the method of the development of this specific case at trial, the court of appeals did not err when it refused to hold the trial judge accountable for distinguishing between different types of knowledge when Appellant's trial counsel failed in the same manner.

Even assuming that this distinction was made on the trial court level, the arguments above about relevance to show knowledge of possession and not just knowledge of what a type of drug looks like would apply.

C. Difference in Stories

Furthermore, the relevancy of Appellant's use of methamphetamine a few months prior to the stop was also demonstrated through the changes in Appellant's story. Towards the beginning of his interactions with law enforcement, Appellant states that he is being "as honest as he can be" and that in spite of his past drug history he was currently "clean."[66] His later admission, to methamphetamine use within the past few months prior to the traffic stop, helps to show the

[65] R.R. Vol. 7, p. 16 (emphasis added).
[66] Court's Exhibit 2; R.R. Vol. 8, p. 41.

untruthfulness of his claim. The fact that Appellant lied to officers during the stop supports the inference that he knew methamphetamine was in the car at the time of the offense.

Rebutting the Defensive Theory

Appellant's defensive theory that the methamphetamine belonged to the passenger is intertwined with what Appellant knew about the presence of the methamphetamine and whether he intended to hide it from law enforcement.

Extraneous offenses are admissible to rebut defensive theories raised by the testimony of a State's witness during cross-examination.[67] Extraneous offenses may also be admissible to rebut defensive theories raised during opening statements.[68]

Appellant further claims under this issue that he did not open the door to the admission of the extraneous offense because merely denying guilt is not sufficient to open the door.[69] However, Appellant went far beyond simply denying his guilt – he admitted that an offense occurred and placed the blame for guilt onto Morgan.

Conclusion

For the court of appeals to have held that the trial judge's decision in this case was outside the zone of reasonable disagreement, the court of appeals would

[67] *Ransom v. State*, 920 S.W.2d 288, 301 (Tex. Crim. App. 1994).
[68] *Bass v. State*, 270 S.W.3d 557, 563 (Tex. Crim. App. 2008); *See Powell v. State*, 63 S.W.3d 435, 439 (Tex. Crim. App. 2001).
[69] *Appellant's Brief on the Merits*, p. 19.

have to determine that a trial judge could not rely on years of case law (1973-2015) and multiple courts of appeals' decisions which have held that extraneous offenses can have relevance to show intent and knowledge. Such a holding would have ignored the appropriate standard of review and substituted the court of appeals' opinion on relevance for the trial judges. Therefore, this Court should uphold the Third Court of Appeals' holding regarding relevance under the ground that the extraneous offenses were relevant to show knowledge and intent.

GROUND FOR REVIEW THREE: THE EXTRANEOUS OFFENSES WERE RELEVANT TO APPELLANT'S IDENTITY

The extraneous offenses were also relevant to show identity in this case.

Appellant states in his brief that identity was not contested because the identities of both occupants of the truck were "no mystery."[70] However, Appellant has confused the idea of identifying all of the individuals at a crime scene by name with identifying who among several known individuals committed a criminal offense.

Appellant claims that the case was "solved" because "Morgan did it."[71] However, that was precisely the fact at issue at trial – did Morgan place the baggie in the cup without any involvement by Appellant, did Appellant place the baggie in the cup, or did Appellant solicit, encourage, direct, aid or attempt to aid Morgan in

[70] *Id.* at p. 21.
[71] *Id.*

placing the baggie in the cup?[72] The court of appeals' decision implicitly noted that this was a trial issue when it described the tampering case as:

> …differ[ing] somewhat from a more typical tampering-by-concealment case in which the police observe behavior indicating that a defendant had undertaken steps to conceal something from an officer during an investigation or in which a defendant admits that he was attempting to conceal evidence from the police.[73]

The trial court also appeared to notice this unusual fact pattern when it described the issues involved as "knowledge and intent…and the subtext of identity…"[74] Additionally, the State's reliance on the law of parties in the tampering case also demonstrates that the issue was in fact – in the language of Appellant – a "whodunit" case.

Therefore, evidence that Appellant was involved – whether as the actor or as a party – in the tampering offense was relevant in this trial. As with intent and knowledge on the possession case, evidence that Appellant intravenously used methamphetamine two and a half or three months prior to the stop and had a previous arrest and conviction for a felony drug offense also provided circumstantial evidence to help prove that not only was Appellant linked to the methamphetamine but he also would have been involved in the tampering offense.

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[72] A person such as Appellant is criminally responsible for an offense committed by the conduct of another, such as Morgan, if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense. *See* Tex. Pen. Code §7.02(a)(2) (West 2017).
[73] *Work v. State*, No. 03-18-00244-CR, 2018 WL 2347013, at *7 (Tex. App.—Austin May 24, 2018, pet. granted) (Mem. op., not designated for publication).
[74] R.R. Vol. 7, p. 85.

Similarity to the Charged Offense

Appellant claims that the extraneous offense was not sufficiently unusual enough to constitute Appellant's "handiwork" or "signature."[75] While similarity is required in the typical identity scenario – where an unidentified person commits a crime – the State believes that the reasoning behind the "signature" crime requirement does not apply in this type of a situation. The "signature" crime or *modus operandi* theory is a theory of relevancy which says that because the charged crime and the extraneous offenses are so distinctively similar that they constitute a "signature."[76] However, case law indicates that the *modus operandi* theory of relevancy is "usually" the theory involved when discussing identity – not the *only* theory possible.[77]

Attempting to force every analysis of the admission of extraneous offenses through one possible theory of relevance is the type of "mechanical solution" that is prohibited on appellate review.[78] The enumerated exceptions to Rule 404(b) are "neither mutually exclusive nor collectively exhaustive."[79] There are numerous

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[75] *Appellant's Brief on the Merits*, p. 22.
[76] *Segundo v. State*, 270 S.W.3d 79, 88 (Tex. Crim. App. 2008).
[77] *See id.*; *Chaparro v. State*, 505 S.W.3d 111, 116 (Tex. App.—Amarillo 2016, no pet.). *See also Bishop v. State*, 869 S.W.2d 342, 346 (Tex. Crim. App. 1993) (en banc) (describing the similarity required as the "traditional rule" for admission). The State would also point out that the theory of *modus operandi* is also not strictly limited to cases where identity was at issue. Some cases cited in Appellant's brief that discuss *modus operandi* are inapplicable to this case and distinguishable because they discuss *modus operandi* in other types of circumstances. *See Owens v. State*, 827 S.W.2d 911, 914-17 (Tex. Crim. App. 1992) (discussing *modus operandi* in terms of rebutting a defensive theory of "frame-up"); *Lopez v. State*, 288 S.W.3d 148, 164 (Tex. App.—Corpus Christi 2009, pet. ref'd) (holding that identity was not at issue at the trial court level).
[78] *See Montogmery v. State*, 810 S.W.2d 372, 377 (Tex Crim. App. 1990) (en banc).
[79] *Id.*

other uses to which evidence of criminal acts may be put.[80] The proponent of uncharged misconduct evidence need not "stuff" a given set of facts into one of the laundry-list exceptions set out in Rule 404(b).[81] Instead, the burden is only to explain to the trial court, and to the opponent, the logical and legal rationales that support its admission on a basis other than "bad character" or propensity purpose.[82]

Therefore, Appellant's attempt to shoehorn the 404(b) analysis into the typical broad general categories is not appropriate given the recognition by both the trial court and the court of appeals that this case is not a typical fact pattern.

Furthermore, even if this Court determines that the extraneous offenses were relevant to show intent and knowledge, but not identity, it should still affirm the Court of Appeals' holding.

GROUND FOR REVIEW FOUR: THE DOCTRINE OF CHANCES IS NOT AN INDEPENDENT BASIS FOR ADMISSION OF EXTRANEOUS OFFENSES BUT RATHER A THEORY OF RELEVANCY UNDERLYING THE ADMISSIBILITY OF EXTRANEOUS OFFENSES

The "doctrine of chances" provides a logical theory of relevancy based upon the belief that "highly unusual events are unlikely to repeat themselves inadvertently or by happenstance."[83] Appellate case law has frequently used the "doctrine of chances" as a means of explaining the relevance of extraneous

[80] *Id.*
[81] *De La Paz v. State*, 279 S.W.3d 336, 343 (Tex. Crim. App. 2009).
[82] *Id.*
[83] *Id.* at 347.

offenses to show intent.[84] The Fourteenth Court of Appeals has explicitly used the doctrine of chances as an explanation for the logical relevance of extraneous offenses to show knowledge and intent.[85]

Appellant complains that the State never presented this theory of admissibility to the trial court and complains that the doctrine of chances was not part of the "law applicable to the case."[86] However, that is because the "doctrine of chances" by itself is not one of the Rule 404(b) exceptions. Rather, it is the legal theory or philosophy undergirding the logic behind the Rule 404(b) exceptions.

Under the *Calloway* rule, the prevailing party at the trial court level need not have explicitly raised an alternative theory in the court below to justify the appellate court's rejection of the appellant's claim.[87] No burden exists in case law or statute for the State to explain the entire philosophical or legal basis undergirding its claims for admissibility. This is illustrated by the policy reasons supporting the *Calloway* rule – a practical reality of the adversarial system is that a party who obtains a favorable ruling from the trial court often has little incentive to

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[84] *See, e.g., Casey v. State*, 215 S.W.3d 870, 880-81 (Tex. Crim. App. 2007); *Plante v. State*, 692 S.W.2d 487, 491-92 (Tex. Crim. App. 1985) (en banc) ("Where the material issue addressed is the defendant's intent to commit the offense charged, the relevancy of the extraneous offense derives purely from: 'the point of view of the doctrine of chances…'"; *Sandoval v. State*, 409 S.W.3d 259, 300 (Tex. App.—Austin 2013, no pet.) ("When evidence of an extraneous offense is offered to show intent, the relevance of the extraneous offense derives from the 'doctrine of chances'…"); *Brown v. State*, 96 S.W.3d 508, 512 (Tex. App.—Austin 2002, no pet.) ("When the defendant's intent to commit the offense charged is at issue, the relevance of an extraneous offense derives from the doctrine of chances…").

[85] *See Hung Phuoc Le v. State*, 479 S.W.3d 462, 470-71 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

[86] *Appellant's Brief on the Merits*, pp. 24-26.

[87] *State v. Esparza*, 413 S.W.3d 81, 85 (Tex. Crim. App. 2013).

conjure up additional reasons for why the trial court should have ruled the way it did.[88] Nor would it be efficient for the prevailing party to do so, as most trial court rulings are correct, and requiring the prevailing party to articulate to the trial court all possible reasons for upholding the ruling would generally be a waste of time.[89]

Therefore, the Third Court of Appeals reference to the doctrine of chances in its opinion was not error as this legal doctrine was part of the law applicable to the case through the State's claims that the extraneous offense was admissible to show knowledge, intent, and identity.

Doctrine of Chances

In this case, the doctrine of chances provides additional proof[90] of the logical relevance of the extraneous offenses in this case for non-propensity purposes. Appellant claims that personal drug abuse is not a highly unusual event that is unlikely to repeat itself inadvertently.[91] Appellant relies on the claim that "prior drug abuse is a hallmark of future drug abuse" as support for this claim.[92] To the extent that Appellant is saying that a unique attribute of drug abuse is that a person becomes addicted and is likely to continue using because of the addiction – the State believes that this claim supports its position that intent and knowledge can

[88] *Id.* at 92 (Keller, P.J., concurring).
[89] *Id.*
[90] The court of appeals decision could be affirmed independent of this ground.
[91] *Appellant's Brief on the Merits*, p. 27.
[92] *Id.*

logically be shown through extraneous drug offenses – without relying on character conformity.

On the other hand, the State does not agree that being in the presence of or same location as methamphetamine is a common, everyday occurrence. Methamphetamine and cocaine are both drugs that are not sold openly, that are illegal with very heavy penalties for possession, and that are typically not shown to people who have no involvement with drugs. Furthermore, getting arrested for someone else's methamphetamine is even less common.[93]

Therefore, it can be concluded that getting caught on two separate occasions with illegal narcotics in your possession that belonged to someone else is a highly unusual event that is unlikely to inadvertently repeat itself.

Furthermore, the degree of similarity required is not so great where intent is the material issue as when identity is the material issue, and extraneous offenses are offered to prove modus operandi.[94] The mere fact that certain dissimilarities are present between the extraneous offense and the offense for which the accused is on trial does not make the extraneous offense inadmissible if the accused is clearly identified and shown to be the perpetrator of the extraneous offense.[95]

[93] Court's Exhibit 2.
[94] *Cantrell v. State*, 731 S.W.2d 84, 90 (Tex. Crim. App. 1987) (en banc); *Smith v. State*, 420 S.W.3d 207, 221 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd).
[95] *Cantrell*, 731 S.W.2d at 90 fn.1.

Therefore, the doctrine of chances does support the appellate court's decision.

RULE 403

The court of appeals did not err when it concluded that the trial judge's decision was within the zone of reasonable disagreement under Rule 403.

Rule of Evidence 403 provides that a court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence. Tex. R. Evid. 403 (West 2019). Rule 403 favors the admission of relevant evidence and carries a presumption that relevant evidence will be more probative than prejudicial.[96]

Burden

It is the opponent's burden to not only demonstrate the proffered evidence's negative attributes under Rule 403 but to show also that these negative attributes "*substantially outweigh"* any probative value.[97]

Courts and commentators have universally recognized that with the enactment of the rules of evidence there was a conscientious decision to give the trial court a considerable freedom in evaluating proffered evidence's probative

[96] *Davis v. State*, 329 S.W.3d 798, 806 (Tex. Crim. App. 2010).
[97] *Montogmery v. State*, 810 S.W.2d 372, 377 (Tex Crim. App. 1990) (en banc) (emphasis in original).

value in relation to its prejudicial effect.[98] A trial court judge is given a "limited right to be wrong," so long as the result is not reached in an arbitrary or capricious manner.[99]

Factors

When conducting a Rule 403 analysis, the trial court must balance: (1) the inherent probative force of the proffered item of evidence along with (2) the proponent's need for that evidence against (3) any tendency of the evidence to suggest decision on an improper basis, (4) any tendency of the evidence to confuse or distract the jury from the main issues, (5) any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (6) the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted.[100]

Probative Force in this Case

The probative force of evidence refers to how strongly it serves to make the existence of a fact of consequence more or less probable.[101]

Case law supports finding that these extraneous offenses had high probative value. The Fourteenth Court of Appeals has held that prior drug involvement can

[98] *Id.* at 378.
[99] *Id.* at 380.
[100] *Gonzalez v. State*, 544 S.W.3d 363, 372 (Tex. Crim. App. 2018).
[101] *Id.*

"cast considerable doubt" on a defendant's claim that he did not possess drugs found in his vehicle.[102] In *Hung Phuoc Le*, the court held that this first factor under Rule 403 weighed heavily in favor of finding that the extraneous offense evidence was substantially more probative than prejudicial. *Id.* An appellate court's holding that this factor weighs heavily in favor of admission supports the conclusion that the trial judge's evaluation of the probative value of the extraneous offenses in this case was within the zone of reasonable disagreement.

Proponent's Need for the Evidence

The court of appeals held that the trial court did not err in holding that the State's need for the evidence neither weighed in favor of nor against the admission of the evidence.[103] An appellate court should evaluate the State's need for the evidence by looking at whether the fact related to a disputed issue and whether the State had other evidence establishing that fact.[104] Given the hotly disputed nature of whether Appellant knew the methamphetamine was in the truck and the very nature of how heavily dependent proof of *mens rea* is upon circumstantial evidence, the State's need for the evidence was extremely high. Although Appellant currently claims that the State "established a good case for joint

[102] *See Hung Phuoc Le v. State*, 479 S.W.3d 462, 471 (Tex. App.—Houston [14th Dist.] 2015, no pet.).
[103] *Work v. State*, No. 03-18-00244-CR, 2018 WL 2347013, at *11 (Tex. App.—Austin May 24, 2018, pet. granted) (Mem. op., not designated for publication).
[104] *Gonzalez*, 544 S.W.3d at 372.

possession" without the extraneous offense,[105] his brief to the court of appeals stated:

> …there is insufficient evidence in this case that directly links Appellant to any of the crimes charged. In fact there was evidence presented that the passenger was the one who possessed and tampered with the evidence. Consequently, this Court should reverse the judgment of the trial court below and the jury's finding that there was sufficient evidence for a conviction.[106]

Therefore, the court of appeals did not err in its evaluation of this factor. In fact, it could easily have justified holding that the State did have a strong need for the evidence.

Any Tendency to Suggest a Decision on an Improper Basis

The Court of Appeals' determination that the extraneous offenses would not suggest that the jury make a decision on an improper basis was reasonable.[107]

Rule 403 is only concerned with "unfair" prejudice.[108] Introduction of the extraneous offense as a transaction rather than as a criminal offense lessens the prejudicial effect.[109] In this case, no outside evidence other than Appellant's own statements were offered to prove the extraneous offenses. Therefore, the prejudicial effect was minimized and the probative value was increased.

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[105] *Appellant's Brief on the Merits*, p. 30.
[106] *Appellant's Brief* before the Third Court of Appeals, pp. 22-23
[107] *See Work*, 2018 WL 2347013 at *12.
[108] *Gonzalez*, 544 S.W.3d at 373.
[109] *Robinson v. State*, 701 S.W.2d 895, 899 (Tex. Crim. App. 1995) (en banc).

Furthermore, a proper instruction on the limited used of an extraneous offense will also lessen the prejudice.[110] The jury charge informed the jury that:

> …any testimony in evidence before you in this case regarding the Defendant having committed offenses or bad acts, if any, other than the offenses alleged against him in the indictment in this case, you cannot consider for any purpose; unless you find and believe beyond a reasonable doubt that the Defendant committed such other offenses or bad acts, and then, you may only consider the same in determining the knowledge, intent, identity, and to rebut a defensive theory and for no other purpose.[111]

This same basic instruction was read to defense counsel, outside the jury's presence, before any of the extraneous evidence was admitted.[112] Appellant's counsel did not have any objections to the wording of the instruction.[113] The trial judge then read this same instruction when the jury returned to the courtroom.[114] As the jury was properly instructed on two different occasions not to use this evidence for improper purposes, any potential prejudicial effect was limited.

The court of appeals also noted that nothing in front of the jury involved allegations of anything more serious or inflammatory than the charged offense and the extraneous offense did not involve a complex subject matter.[115]

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[110] *Id.*; *See Hung Phuoc Le v. State*, 479 S.W.3d 462, 471-72 (Tex. App.—Houston [14th Dist.] 2015, no pet.).
[111] C.R. p. 56.
[112] R.R. Vol. 7, pp. 96-97.
[113] R.R. Vol. 7, p. 96. Similarly, defense counsel did not object to the form of this instruction during the charge conference. R.R. Vol. 8, pp. 85-88.
[114] R.R. Vol. 7, p. 99.
[115] *Work v. State*, No. 03-18-00244-CR, 2018 WL 2347013, at *12 (Tex. App.—Austin May 24, 2018, pet. granted) (Mem. op., not designated for publication).

All of these factors demonstrate that the court of appeals' decision on this factor was not error.

Time Needed to Develop the Evidence

The court of appeals determined that over two days of evidence and 300 pages of reporter's record, evidence of the extraneous offense totaled a few minutes in length.[116] Appellant complains that the court of appeals erred in this analysis because the two videos were approximately several hours long.[117] However, very small portions of those videos related to the extraneous offenses.

As can be seen through Appellant's own motions before the trial court, the times involved on the video are very brief, involving at most around five minutes.[118] In Appellant's motions filed before trial, Paragraph 4 (the prior drug arrest) objected to references at 13:56 of the video.[119] Paragraph 5 references an objection starting at 16:00 of video.[120] The trial judge did not admit the section of the video that corresponded to Paragraph 5.[121] Therefore, at most, the section referenced by Paragraph 4 is one minute and four seconds long.

[116] *Id.*
[117] *See Appellant's Brief on the Merits*, p. 33.
[118] *See* C.R. pp. 34-41.
[119] *See* C.R. pp. 35, 38; R.R. Vol. 7, p. 84.
[120] *See* C.R. pp. 35, 38.
[121] R.R. Vol. 7, pp. 87-88.

Paragraph 6 (the prior drug conviction) of the motions objected to references at 16:29 of the video.[122] Paragraph 7 references an objection starting at 16:33 of the video.[123] The trial judge did not admit the section of the video that corresponded to Paragraph 7.[124] Therefore, the section admitted under Paragraph 6 was four seconds long.

Paragraphs 9 (Miranda rights) and 10 (meth use a few months prior) that were admitted covered the video from 55:44 to 59:20.[125] Therefore, at most, this segment is less than four minutes long.

Therefore, in total, the evidence objected to lasted around five minutes. The court of appeals determination that the trial court's assessment that five minutes was reasonable in a two day trial was not error and weighs in favor of admission.

Conclusion

Given the reasonableness of the thorough analysis performed by both the trial court and the court of appeals, no grounds exist to find that either erred given the deferential standard of review.

[122] *See* C.R. pp. 35, 38; R.R. Vol. 7, p. 88.
[123] *See* C.R. pp. 35, 39.
[124] R.R. Vol. 7, pp. 89-90.
[125] *See* C.R. pp. 35, 39.

HARM

Furthermore, although the court of appeals did not address this issue, the State claimed before the court of appeals that even if it had been error to admit the evidence of the extraneous offenses, that Appellant could not meet the burden of showing harm.

Rule 44.2(b) of the Rules of Appellate Procedure provides that any error, other than constitutional error, that does not affect substantial rights must be disregarded.[126] A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict.[127]

Given the instructions to the jury about the proper purposes for considering the extraneous offenses and the presumption that jurors follow such instructions, Appellant cannot show that his substantial rights were affected.[128]

Additionally, as the court of appeals pointed out, a deputy directly testified to the same evidence of extraneous offenses that came in through the video, yet Appellant's trial counsel did not object to the deputy's testimony.[129] This fact also supports a finding that any error in the admission of the recording did not affect Appellant's substantial rights.

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[126] Tex. R. App. Proc. 44.2(b) (West, Westlaw through 2017).
[127] *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997).
[128] An appellate court should generally presume that a jury followed a trial court's instruction regarding consideration of evidence. *Thrift v. State*, 176 S.W.3d 221, 224 (Tex. Crim. App. 2005).
[129] *Work v. State*, No. 03-18-00244-CR, 2018 WL 2347013, at *10 (Tex. App.—Austin May 24, 2018, pet. granted) (Mem. op., not designated for publication); R.R. Vol. 7, pp. 103-04.

Appellant does not make any direct harm arguments in his brief currently before this Court. Therefore, he cannot show that his substantial rights were affected and so the error should be disregarded.

PRAYER

Therefore, the State respectfully requests that this Court affirm the court of appeals' decision and uphold the conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing brief was mailed to Keith S. Hampton, Attorney at Law, 7000 North Mo Pac Expressway, Suite 200 on the 15th day of April, 2019.

/S/ Elisha Bird
Elisha Bird

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing brief was emailed to Stacey Soule at the State Prosecuting Attorney's Office at Stacey.Soule@SPA.texas.gov on the 15th day of April, 2019.

/S/ Elisha Bird
Elisha Bird

CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Tex. R. App. Proc. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word count limitations of Tex. R. App. Proc. 9.4(i), if applicable, because it contains 10,599 words, excluding any parts exempted by Tex. R. App. Proc. 9.4(i)(1) if necessary.

/S/ Elisha Bird
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